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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 670

WILLIAM C. KRUEGER, HUGH C. BARRETT AND INGLIS M. UPPERCU, AS SURVIVING TRUSTEES IN LIQUIDATION OF UNITED STATES BREWING COMPANY, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of New Jersey (R. 496–500) is reported in 33 F. Supp. 102. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 514–521) is reported in 121 F. (2d) 842.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1941 (R. 521). The petition for writ of certiorari was filed September 30, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in the circumstances of this case the liquidating trustee actively in charge of winding up the affairs of a dissolved New Jersey corporation, although not expressly authorized by a majority of the trustees, had implied authority to execute waivers extending the statutory period for the assessment and collection of taxes.

2. Whether, in any event, the trustees are estopped to recover the taxes.

3. Whether amendments to timely claims for refund were barred where filed after the statutory period and where based on alleged insufficient allowances for obsolescence, the original claims having been based on the ground that the assessment of the taxes was barred by the statute of limitations.

STATUTES INVOLVED

The pertinent portions of the statutes involved are quoted in the Appendix, *infra,* pp. 17–24.

STATEMENT

This is a suit by the petitioners as the surviving trustees in liquidation of United States Brewing Company, a New Jersey corporation, to recover cer-

tain income and profits taxes which were assessed against the Company for periods prior to its dissolution on July 10, 1922, and which were paid on December 15, 1926, out of funds of the Company by a check signed by two of the petitioners (R. 30–31, 490). The complaint contains two counts (R. 3–13), the second of which is relied on by the petitioners if recovery under the first is denied (Pet. 6). The district court granted recovery under the first count (R. 500–502) and accordingly found it unnecessary to pass upon the second (R. 495). The circuit court of appeals reversed the judgment of the district court, holding that no recovery could be had under either count.

The facts, as they appear from documentary evidence or as stipulated or found by the district court, may be summarized as follows:

First Count: In this count the petitioners allege that they are entitled to recover the full amount of taxes paid in 1926, covering, exclusive of interest, the following:

Deficiency for period January 1, 1918, to March 31, 1918	$4,885.19
Deficiency for fiscal year ended March 31, 1919	38,206.46
Deficiency for fiscal year ended March 31, 1920	87,241.61
Deficiency for fiscal year ended March 31, 1921	1,086.83

The alleged grounds for recovery are that these taxes were assessed and collected beyond the statutory periods of limitation and that waivers extending the periods were void because not authorized by a majority of the liquidating trustees. Since on oral argument before the district court peti-

tioners withdrew their claim to the $4,885.19 tax (R. 477, Pet. 6), the only issues are with respect to the taxes for 1919, 1920, and 1921. ~~for the execution of the waivers.~~

Under Section 277 (a) (2) and (3) of the Revenue Act of 1926 (Appendix, *infra,* p. 17), the time for the assessment and collection of the taxes for these years expired on May 15, 1925, June 5, 1925, and June 11, 1926, respectively (R. 23. Cf. R. 489; Pet. 5). The taxes were not assessed until October 1926; they were paid, as aforesaid, on December 15, 1926 (R. 30). Prior to these dates, however, various waivers were executed the last four of which, if valid, extended the time for assessment and collection to December 31, 1926, for each of the years 1918, 1919, 1920, and 1921 (R. 25, 27, 29, 164, 184, 227–234).[1]

The four waivers referred to were executed on December 14, 1925 (R. 29, 227–234). They were signed for the Company in liquidation by "Wm. C. Krueger Vice Pres." He was vice president of the Company prior to its dissolution and thereafter vice chairman of the board of liquidating trustees. The waivers were stamped by the corporate seal and, in addition, signed by Hugo

[1] Claims for refund filed in February 1930 (R. 301–330) were rejected by the Commissioner upon the grounds that the $4,885.19 tax had been assessed and collected within the statutory period, a claim in abatement having been filed, and that as to the other taxes the waivers were valid (R. 358–359, 363–364).

Boepple, Jr., as assistant secretary.[2] The district court found that the other two liquidating trustees never authorized Krueger or Boepple to sign the waivers and that the receipt, execution, and filing of the waivers was not called to their attention or discussed with them (R. 489).

The district court also found, however, that the Company's tax returns for the years 1918 to 1923 had been signed by Krueger and Boepple, or Krueger and the treasurer, who died September 8, 1922, and for the year ended subsequent to the dissolution, by Krueger alone (R. 484–485. See also R. 23, 140–143), and that during the period in controversy when the waivers were executed Krueger was "the only trustee of the corporation dealing at first hand with its affairs," the other trustees being inactive (R. 491). The district court further found that in not assessing the taxes until after the statutory periods the Commissioner relied upon the waivers signed by Krueger (R. 491).

The waivers were executed at the suggestion or request of the Bureau to enable it to consider all the information at hand "or any which you (the Company) may wish to submit later" and to

[2] The President of the Company and Chairman of the trustees prior to his death in 1926 was Gottfried Krueger, the father of William C. Krueger (R. 23). Boepple was assistant secretary of the Company prior to dissolution and thereafter was assistant secretary of the liquidating trustees (R. 487–488). He was in charge of the Company's books and records (R. 422–425).

avoid the necessity of an immediate assessment of additional taxes (R. 29, 224–225, 485). The following circumstances form the background.

By letter of December 12, 1923, the Company had requested the Commissioner to direct that a then pending investigation into the Company's accounts for 1918 and 1919 be extended to include those for the following years to the date of dissolution because of the impossibility of completing the liquidation "until the taxes due the Federal Government have been fully ascertained" (R. 24, 149). On January 30, 1924, after the Company had received a report of its tax liability for 1918 and 1919, it wrote to the Internal Revenue Agent in Charge at Trenton, New Jersey, advising him that it would protest certain of the findings in the report and requesting permission to delay filing a brief in support of its protest "until the present examination [of its returns to the date of dissolution] is completed" (R. 24, 150). In response to this request the Company was notified that additional time for filing the brief would be granted if a waiver were executed, the limitation period for the 1918 and 1919 taxes under the statute then applicable otherwise expiring March 1, 1924 (R. 24, 151–152). On February 11, 1924, shortly after receipt of this notification, a waiver signed for the Company by Boepple was filed with the Agent extending for one year the statutory period for the 1918 and 1919 taxes (R. 25, 164–165).

Thereafter, in March 1924, a deficiency of $426,209.28 was assessed for the year 1918. A claim for abatement of this tax, signed for the Company by Krueger as vice president, was filed on April 7, 1934 (R. 26, 166). Several weeks later the Agent submitted reports showing deficiencies for the fiscal years ended March 31, 1918 and 1919 in the amounts of $6,914.21 and $84,-681.50, respectively, instead of the $426,209.28 amount assessed for the calendar year 1918, and recommending the assessment of certain deficiences for the fiscal years 1920 and 1921 (R. 486).

On November 10, 1924, following a postponement requested by the Company because of the absence of Krueger "the Trustee now in charge of the Company's affairs" (R. 26, 170), a conference attended by Krueger was held in Washington, D. C., with representatives of the Income Tax Unit to discuss the Company's tax liability for the various years (R. 26–27). Krueger was accompanied by an accountant and by William F. Hoffman (R. 487), a trustee of an estate which was a substantial stockholder of the Company (R. 172). Hoffman had been appointed by the liquidating trustees their attorney in fact "for the purpose of attending at such conferences [as might be held with the Income Tax Unit] in the interest of the Company and its stockholders" (R. 173). At the conference the taxpayer was granted 30 days' additional time in which to establish its

claims for reduction in its taxes "conditional upon waivers being filed for 1918 and 1919" (R. 175–176, 180–181). Two days later a waiver signed for the Company by "Wm. C. Krueger, Liquidating Trustee" and attested by Boepple as assistant secretary was filed with the Commissioner extending for one year the statutory periods for the three months ended March 31, 1918, and for the fiscal years ended March 31, 1919 and 1920 (R. 27, 181–182).

Together with this waiver there was forwarded to the Commissioner a power of attorney of the same date signed for the Company by Krueger and attested by Boepple appointing Edward M. Treanor the Company's attorney to take all necessary or appropriate action with respect to the taxes (R. 27, 182–183). The Deputy Commissioner returned the power of attorney, requesting that it be executed "by the board of directors who under the laws of New Jersey are trustees in liquidation of the dissolved corporation" (R. 28, 200–201). Although counsel for the Company in an opinion had notified the Commissioner that they believed the power was validly executed (R. 196–200), a request to cancel it was made on the ground that company officials attended the original conference of November 10, 1924, and would attend future conferences (R. 201).

Subsequent to the original conference which was attended by Krueger, as aforesaid, the amount of

tax deficiencies was considered from time to time in conferences during 1925 and until June 3, 1926, when the Commissioner finally notified the Company of his proposed determination (R. 486–487). These conferences were attended by Hoffmann, representing the petitioners, and at them various protests and data were submitted in behalf of the taxpayer (R. 486). The district court found that the waivers had not been called to the attention of Hoffmann (R. 488, 489), but that, without complete information as to its accuracy, he ultimately accepted the Government's figure of approximately $129,000 taxes due (R. 487).

Second Count: Under this count the petitioners seek to recover $70,381.79, representing a portion of the same taxes involved under the first count (R. 8–13). The alleged basis for this relief is that the Commissioner allowed insufficient deductions for obsolescence of the Company's breweries. Since the taxes were paid on December 15, 1926 (R. 30–31), the time for filing claims for refund expired December 15, 1930 (Revenue Act of 1926, Sec. 284 (b) (1), Appendix, *infra,* pp. 18–19). Claims for refund asserting the grounds alleged in the First Count were filed on February 6, 1930 (R. 31–32, 301–330), and in 1931 memoranda were filed in support of these claims (R. 331–349). Thereafter, on August 11, 1932, the claims were amended to include the contention that additional deductions should have been allowed for obso-

lescence (R. 32, 350–355). On the ground that this subject matter was not covered by the original claims, the Deputy Commissioner refused to consider the amendments on the merits (R. 361–364). The district court, although not passing upon the Second Count, made a finding that no claims presenting the issue raised by it were filed prior to December 15, 1930 (R. 490). The court below, in denying recovery under the Second Count, ruled that the respective questions covered by the claims for refund as originally filed and by the amendments "could hardly be at more distant poles" (R. 521).

ARGUMENT

First Count

A. In reversing the judgment of the district court and denying any recovery under the First Count, the court below held that Krueger had implied authority to execute the waivers and that under settled principles of agency the other liquidating trustees were bound by them (R. 518–519). This holding was clearly correct in view of the undisputed facts (*supra*, pp. 5, 7) showing that Krueger, with the apparent approval or at least acquiescence of the other trustees, was in active charge of winding up the Company's affairs. The contention that he was not authorized to execute the waivers was first advanced some 5 years after they were entered into and more than 3

years after the taxes were paid. And even now there is no suggestion that he did not act for the benefit of the other trustees and stockholders or that he departed from any instructions.

Under Section 53 of the Corporation Act of New Jersey (L. 1896, c. 185, Appendix, *infra*, p. 22), the corporate existence of dissolved New Jersey corporations continues "for purposes of * * * enabling them to settle and close their affairs * * *," and under statutory provisions similar to those of New Jersey it is well established that waivers executed by a single officer after dissolution are valid where, as here, in view of the officer's position and duties, they would have been binding on the corporation if there had been no dissolution. *Jaffee* v. *Commissioner*, 45 F. (2d) 679 (C. C. A. 2), certiorari denied, 283 U. S. 853; *Commissioner* v. *Angier Corporation*, 50 F. (2d) 887 (C. C. A. 1), certiorari denied, 284 U. S. 673; *Commissioner* v. *Godfrey*, 50 F. (2d) 79 (C. C. A. 2), certiorari denied, 284 U. S. 653; *Helvering* v. *South Penn Oil Co.*, 68 F. (2d) 420 (App. D. C.).[3]

Although the court below accepted local law as controlling (R. 517), the petitioners contend (Pet. 12, 21–30) that its decision is contrary to New Jer-

[3] See also *Continental Oil Co.* v. *United States*, 14 F. Supp. 533 (C. Cls.); *Newark Morning Ledger Co.* v. *Commissioner*, 39 B. T. A. 654; *T. H. Symington & Son, Inc.*, v. *Commissioner*, 35 B. T. A. 711; *Morning Sun Publishing Co.* v. *Commissioner*, 31 B. T. A. 356.

sey law and therefore in conflict with *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U. S. 257; *Glenn* v. *Liggett,* 135 U. S. 533. They assert that Sections 31, 54, and 73 of the Corporation Act (Appendix, *infra,* pp. 21–24) and the decision in *In re Delaware R. R. Co.,* 76 N. J. L. 163 (Sup. Ct.), require that the liquidating trustees of a dissolved New Jersey corporation act by a majority or, if through an agent, through one authorized by a majority of the trustees. However, there is nothing in those provisions or in the decision or opinion cited which requires the authorization to be express. In the *Delaware R. R. Co.* case one of the three trustees who executed the proxy appointing Thompson to vote the stock revoked his assent to it and, so far as appears, unlike the situation here, there were no circumstances from which it could have been inferred that Thompson was authorized by either of the two trustees who had not joined in the proxy. Hence that case is inapplicable.

The petitioners contend also (Pet. 13, 30–34) that the decision of the court below is contrary to Rule 52 (a) of the Rules of Civil Procedure and to decisions[4] of several circuit courts of appeals

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[4] *Santa Cruz Oil Corp.* v. *Allbright-Nell Co.*, 115 F. (2d) 604 (C. C. A. 7); *Webb* v. *Frisch*, 111 F. (2d) 887 (C. C. A. 7); *Continental Oil Co.* v. *Jones*, 113 F. (2d) 557 (C. C. A. 10); *Kelly* v. *Aderhold*, 112 F. (2d) 118 (C. C. A. 10); *Wittmayer* v. *United States*, 118 F. (2d) 808 (C. C. A. 9).

interpreting that Rule, which provides that findings of fact shall not be set aside unless clearly erroneous. It is true that the district court found that the other trustees "never authorized" Krueger to execute the waivers (R. 488, 489). But this finding, as indicated by the word "never," means only that there was no express authorization. If it were to be construed to mean in addition that Krueger lacked any implied authority, it would be a conclusion of law and, in any event, clearly erroneous.

B. Whether or not under principles of agency the waivers were authorized, it seems clear that the petitioners should be estopped to deny their validity or to recover the taxes. The facts (*supra,* pp. 6–9) show, in substance, that the petitioners requested the Commissioner to arrive at a full determination of the Company's tax liability for all of the years involved before making or enforcing an assessment for 1918, that they asked and were granted additional time to support their protests, that as a consequence of the protracted consideration given their side, the original assessment of $426,209.28 for 1918 was reduced to $4,885.19 and $38,206.46 for the first three months of 1918 and the year ended March 31, 1919, respectively, and that, apart from their contention under the Second Count, they do not deny that the taxes paid were owing. In these circum-

stances it would be inequitable for them to recover and, under decisions in analogous cases, they are estopped. See *Stearns Co.* v. *United States,* 291 U. S. 54; *Stone* v. *White,* 301 U. S. 532, 537–538; *Union Bleachery* v. *Commissioner,* 97 F. (2d) 226 (C. C. A. 4); *Lucas* v. *Hunt,* 45 F. (2d) 781 (C. C. A. 5); *Wonder Bakeries Co.* v. *United States,* 6 F. Supp. 228 (C. Cls.).

Second Count

In support of this count the petitioners contend (Pet. 34–46) that the facts with respect to the allowances for obsolescence necessarily would have been ascertained by the Commissioner in deciding the merits of the claims for refund filed within the statutory period and that therefore the subsequent amendments to the claims were proper and should have been determined. This contention is untenable. The timely claims for refund raised no question with respect to the allowances for obsolescence, but were limited to the distinct issues as to the validity and effect of the waivers.

The petitioners rely (Pet. 8–10, 38–39) upon the fact that they filed memoranda in support of the timely claims wherein for the purpose of showing that they were not estopped they called the Commissioner's attention to certain circumstances concerning the deductions for obsolescence (R. 340–341). But such fact is immaterial. The Commissioner upheld the waivers and accordingly

had no occasion to, and did not, determine the question of estoppel (R. 358–364). Moreover, even if that question had been decided, there would have been no need to investigate the allowances for obsolescence.

The decision of the court below that the amendments were barred is in accord with *United States* v. *Andrews,* 302 U. S. 517, and *United States* v. *Garbutt Oil Co.,* 302 U. S. 528. In each of the cases [5] cited by the petitioners (Pet. 13–14, 35–39, 40–44) as being in conflict or probable conflict with the decision of the court below, except *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73, reaching a result similar to that herein, the facts were such that the Commissioner's consideration of the timely claims necessarily required him to investigate the subject later included by amendment.

CONCLUSION

The decision below is correct. It turns upon the peculiar facts of the case and does not present a question of general importance. There is

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[5] *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62; *United States* v. *Factos & Finance Co.,* 288 U. S. 89; *Bemis Bros. Bag Co.* v. *United States,* 289 U. S. 28; *Pink* v. *United States,* 105 F. (2d) 183 (C. C. A. 2); *Youngstown Sheet & Tube Co.* v. *United States,* 7 F. Supp. 290 (C. Cls.), certiorari denied, 293 U. S. 599; and in *Con. P. Curran Printing Co.* v. *United States,* 15 F. Supp. 153 (C. Cls.), certiorari denied, 301 U. S. 686, on the same matter.

no conflict of authority. The petition should be denied.

Respectfully submitted,

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